In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1943

No. 765

RUSSELL G. SMITH,
Petitioner (Appellant Below),
vs.
L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent (Appellee Below).

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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No.

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vs.
L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent (Appellee Below).

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Russell G. Smith petitions that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered and filed on December 30, 1943, in a cause pending in

that Court numbered and entitled, "No. 10,439, Russell G. Smith, Appellant, vs. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee". (R. 181.) Said judgment affirmed an order of the United States District Court for the Northern District of California, Southern Division, adjudging petitioner to be guilty of contempt and committing him to the custody of the United States Marshal until he should purge himself thereof. Said judgment and decision of the United States Circuit Court of Appeals is not yet reported but should appear in 139 Fed. 2d. The decision appears in the record of this case at page 181.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

In the United States District Court for the Northern District of California, Southern Division, a complaint was filed by the Administrator of the Fair Labor Standards Act of 1938, plaintiff, against the Bank of America National Trust and Savings Association, defendant, seeking an injunction enjoining the defendant from violating the provisions of said Act. (R. 2, 22.) The petitioner herein was not a party to the suit in the United States District Court, and the complaint in that case was not in the record on appeal to the United States Circuit Court of Appeals.[1]

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[1]In this connection the United States Circuit Court in a footnote to its decision stated:

> "The records on appeal do not contain the complaint or the Bank's answer, and what is said here in respect of the condition of the pleadings is obtained from the briefs." (R. 182.)

In the United States District Court under Rule 34 of the Federal Rules of Civil Procedure the plaintiff obtained an order directing the defendant bank to produce certain books and records for examination. Petitioner was not named in this order. (R. 10.) Petitioner was an officer of said defendant bank and failed to produce the books and records. (R. 17.) Thereupon an order to show cause was issued against petitioner directing him to show cause, if any he might have, why he should not be held in contempt of Court for failure to produce the books and records. (R. 21.) To this order to show cause petitioner filed a verified return in which he alleged as a matter of fact that the District Court had no jurisdiction of the subject matter because the defendant bank had no employees engaged in interstate commerce. (R. 22 and 23.) A hearing was held in the District Court and upon the mere showing that petitioner had so failed to produce the books and records he was found to be in civil contempt of Court and was directed to be placed in the custody of the United States Marshal. (R. 99, 128, 148, 155.) Petitioner was released on his own recognizance pending appeal.

Petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit, and that court affirmed the judgment of contempt of the lower court. (R. 188.) The Circuit Court stated that jurisdiction in the separate contempt proceeding was sustained by allegations in the complaint in the principal cause which was not in the record on appeal and to which petitioner was not a party. (R. 186, 187.)

II.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 240, Subdivision (a) of the Judicial Code. (28 USCA, Section 347a.) Cases sustaining the jurisdiction of this Court are *McCrone v. United States* (1939), 307 U. S. 61, and *Nye v. United States,* 313 U. S. 33.

The decision and judgment of the United States Circuit Court of Appeals was entered and filed on December 30, 1943. On January 27, 1944, a petition for rehearing was filed which was denied on February 1, 1944.

III.

THE QUESTIONS PRESENTED.

This case presents the following questions:

(1) Whether in civil contempt proceedings the constitutional guaranties of due process must be observed.

(2) Whether a United States District Court can legally find a person guilty of contempt of court where the record before said court affirmatively establishes that said court is acting without jurisdiction.

(3) Whether a determination by a United States Circuit Court of Appeals affirming a judgment of contempt by a United States District Court is subject to review in this court where such judgment is clearly erroneous and there is no evidence in the record to support it.

(4) Whether a United States Circuit Court of Appeals may affirm a conviction for contempt by a United States District Court where the evidence and the record affirmatively establish without conflict that the District Court had no jurisdiction.

(5) Whether a United States Circuit Court of Appeals in affirming a judgment of the United States District Court which is not supported by any evidence in the record may resort to matters not a part of the record and not within judicial notice.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

This case presents important and serious questions in the administration of justice in the federal courts. The case squarely presents the issue of whether a witness, or third person, brought into a case to which he is not a party is entitled in a contempt proceeding to the constitutional guaranties of due process prior to being deprived of his liberty. The record in the contempt proceeding affirmatively showed the United States District Court to be without jurisdiction; nevertheless, the District Court proceeded to find petitioner guilty and to punish him. This directly violates the due process provisions of the Federal Constitution. A review on writ of certiorari should be granted because the United States Circuit Court of Appeals has affirmed a decision probably in conflict with the appli-

cable decisions of this Court. (*Hovey v. Elliott,* 167 U. S. 409; *Cooke v. U. S.,* 267 U. S. 517.)

Certiorari should also be granted because the United States Circuit Court by its decision has sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings in that it has sanctioned a procedure in which an individual is deprived of liberty without conformance to the most elemental concepts of due process. (*Mooney v. Holohan,* 294 U. S. 103.)

Further, the United States Circuit Court has departed from the accepted and usual course of judicial procedure in affirming a judgment of the District Court, which is a court of limited jurisdiction, where the record affirmatively establishes lack of jurisdiction. It should be emphasized that this is not a case of conflicting evidence, but a case where *the only evidence in the record* shows no jurisdiction. In this regard the decision of the United States Circuit Court of Appeals for the Ninth Circuit is contra to the decisions of other Circuits and of this Court which held that a federal Court is one of limited jurisdiction and that jurisdiction is never presumed. On the contrary it is held that the Court is without jurisdiction unless such affirmatively appear from the record. Certiorari is required because this point arises in a case where personal liberty is directly concerned. (*Ex parte Smith,* 94 U. S. 455.)

In addition the United States Circuit Court departed from the accepted and usual course of judicial proceedings in that it affirmed a judgment of the United States District Court through resort to assumed facts not within judicial notice and not found in the record. In this regard the decision of the Circuit Court of Appeals is again in conflict with the decisions of other circuits and with the applicable decisions of this Court. (*White v. Central Dispensary and Emergency Hospital,* 99 Fed. (2d) 355; *West Ohio Gas Co. v. Public Utilities Commission,* 294 U. S. 63.) The case directly presents a most serious question in the administration of justice, i.e., to what extent when individual liberty is at stake may a reviewing court go beyond the record and judicial notice to support a judgment.

Wherefore, petitioner prays that this Court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in the cause numbered and entitled in said Court "No. 10,439, Russell G. Smith, Appellant, v. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee", to the ends that said cause may be reviewed by this Court as provided by law; that said judgment of said Circuit Court of Appeals be reversed and that your

petitioner have such other and further relief in the premises as this Court may deem proper.

Dated, San Francisco, California,
March 1, 1944.

Respectfully submitted,
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Attorneys for Petitioner.

KENNETH M. JOHNSON,
Of Counsel.

CERTIFICATE OF COUNSEL.

The foregoing petition for writ of certiorari together with the hereinafter contained supporting brief, is well founded in point of fact and law, is presented in good faith, and is not interposed for delay.

Dated, San Francisco, California,
March 1, 1944.

LOUIS FERRARI,
Of Counsel for Petitioner.